STATE OF MICHIGAN

IN THE SUPREME COURT

NATIONAL WINE & SPIRITS, INC.,
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiff-Appellants

v

STATE OF MICHIGAN,

Defendant-Appellee

and

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

Supreme Court No. 126121

Court of Appeals
No. 243524

Circuit Court for the County of
Ingham No. 02-13-CZ

126121
SUPP

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PLAINTIFFS-APPELLANTS' THIRD SUPPLEMENTAL AUTHORITY

Plaintiffs' application for leave was held in abeyance pending the United States Supreme Court's decision in *Granholm v Heald*, 544 US __; __ S Ct __; __ L Ed 2d __ (2005)(copy attached). *Heald*, which was decided last week, struck down Michigan's law against Internet wine sales, holding that "the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own" members of the alcoholic beverage industry. *Heald*, slip op at 23. As the Supreme Court had observed in *Bacchus Imports, Ltd* v *Dias*, 468 US 263, 276; 104 S Ct 3049; 82 L Ed 2d 200 (1984), "'The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.'" *Heald*, slip op at 24. When discrimination exists, the Court has "'generally struck down the statute without further inquiry.'" *Heald*, slip op at 24, quoting *Brown-Forman Distillers Corp* v *New York State Liquor Authority*, 476 US 573, 579; 106 S Ct 2080, 90 L Ed 2d 552 (1986). Further, to save a discriminatory law, states have the burden of submitting evidence of a legitimate, local purpose that cannot be served through nondiscriminatory means. *Heald*, slip op at 29.

MCL 436.1205(3) discriminates against out-of-state authorized distribution agents (ADAs) by effectively granting Michigan ADAs who are also wine wholesalers the exclusive privileges of: (1) selling successful wine brands; (2) "dualing" in wines; and (3) developing combined cost economies. This statute unambiguously violates the Commerce Clause by favoring Michigan ADA/wine wholesalers over all other ADA/wine wholesalers. Under *Heald's* analysis, the Twenty-first Amendment does not authorize Michigan to discriminate in this manner. Because Defendants did not meet their burden of producing actual evidence that this discrimination against out-of-state ADA/wholesalers like Plaintiffs serves a legitimate, local purpose that cannot be served without discrimination (Defendants made only unsubstantiated assertions), this law must be declared unconstitutional.

An additional factual similarity between this case and *Heald's* companion case (*Swedenburg v*

Kelly) requires reversal in this case: both the New York law at issue in *Swedenburg* and MCL 436.1205(3) grant a preference to members of the alcoholic beverage industry that have a *physical presence* in the state. Under the New York statutory scheme, only wineries that had a physical location in the state could obtain a license to ship wine directly to New York customers. *Heald*, slip op at 10-11. This imposed a significant expense on out-of-state wineries that effectively barred them from selling directly to New York customers. *Id.* at 11. The Supreme Court soundly criticized this particular element of the New York statutory scheme, stating, "New York's in-state presence requirement runs contrary to our admonition that States *cannot require* an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* (emphasis added), quoting *Halliburton Oil Well Cementing Co* v *Reily,* 373 US 64, 72; 83 S Ct 1201; 10 L Ed 2d 202 (1963). In other words, the Court was strongly suggesting that a physical presence requirement is per se constitutionally invalid.

The discrimination based on physical presence is better hidden in Michigan law, but even more egregious than in New York. Under MCL 436.1205(3), only ADAs who were also wine wholesalers in Michigan before September 24, 1996 have the ability to dual in wines, i.e., "to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand." In order to dual under MCL 436.1205(3), a wine wholesaler must have resided in Michigan for at least one year to obtain a wholesaler license. See MCL 436.1601(1). *Because of this residency requirement, as of September 24, 1996, only Michigan residents were wine wholesalers.* Thus, the Legislature permanently barred any out-of-state ADA/wholesalers from ever selling brands of wine sold on and since September 24, 1996 by a wholesaler because it is impossible – not merely impractical or infeasible – for out-of-state ADA/wholesalers to rewind the clock to meet the residency requirement.

Because the trial court and Court of Appeals upheld the discrimination allowed under MCL 436.1205(3), contrary to what the Constitution requires, Plaintiffs respectfully ask this Court to grant their application for leave to appeal and strike down MCL 436.1205(3) in light of this new precedent.

Respectfully submitted,

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